



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Parts 21 and 22

[Docket No. FWS-HQ-MB-2023-0015; FF09M31000-234-FXMB12320900000]

RIN 1018–BF58

### Exhibition of Migratory Birds and Eagles

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** This document advises the public that the U.S. Fish and Wildlife Service (Service, or we) intends to gather information necessary to develop a proposed rule for the exhibition of migratory birds and eagles. We are furnishing this advance notice of proposed rulemaking to advise other agencies and the public of our intentions and obtain suggestions and information on the scope of issues to include in the rulemaking.

**DATES:** We will consider comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date.

**ADDRESSES:** You may submit a comment by one of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, enter FWS-HQ-MB-2023-0015, which is the docket number for this action. Then click the Search button. On the resulting page, you may submit a comment by clicking on “Comment.” Please ensure that you have found the correct document before submitting your comments.

- U.S. Mail: Public Comments Processing, Attn: FWS-HQ-MB-2023-0015, U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide. See **Public Comments**, below, for more information.

**FOR FURTHER INFORMATION CONTACT:** Jerome Ford, Assistant Director—Migratory Birds, telephone: 1–703–358–2606.

**SUPPLEMENTARY INFORMATION:**

**Background**

The U.S. Fish and Wildlife Service is the Federal agency delegated with the primary responsibility for managing migratory birds, including bald eagles and golden eagles. Our authority derives primarily from the Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. 703–712 (MBTA), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Russian Federation. The MBTA protects certain migratory birds from take, except as permitted under the MBTA. We implement the provisions of the MBTA through regulations in parts 10, 13, 20, 21, and 22 of title 50 of the Code of Federal Regulations (CFR). Regulations pertaining to migratory bird permits are set forth at 50 CFR part 21.

In addition, the Bald and Golden Eagle Protection Act, 16 U.S.C. 668–668d (Eagle Act), prohibits take of bald eagles and golden eagles except pursuant to Federal regulations. The Eagle Act authorizes the Secretary of the Interior to issue regulations to permit the “taking” of eagles for various purposes, including the protection of other interests in any particular locality (16 U.S.C. 668a), provided the taking is compatible with the preservation of eagles. Regulations pertaining to eagle permits are set forth at 50 CFR part 22.

The Service currently authorizes the exhibition of migratory birds under a Special Purpose Possession Live permit (FWS Form 3-200-10c) issued under the special purpose permit regulations (50 CFR 21.95). Exhibition of bald eagles and golden eagles currently requires an Eagle Exhibition Live permit (FWS Form 3-200-14) issued under 50 CFR 22.50. On September 21, 2010, the Service proposed a permit regulation for the possession and use of migratory birds

in educational programs and exhibits (75 FR 57413). Comments received on the proposed regulation were generally supportive. However, the Service did not finalize the rule due to prioritizing other rulemakings. The Service is now seeking to reinstate a rulemaking for migratory bird exhibition and eagle exhibition. However, enough has changed in the field of exhibition that the Service is seeking public input before preparing a new proposed rule.

We intend to propose new migratory bird exhibition regulations to authorize possession of live, non-releasable or captive-bred migratory birds for use in teaching people about migratory bird conservation and ecology. We also anticipate proposal of revisions to regulations authorizing eagle exhibition (50 CFR 22.50), in particular revisions for permittees that hold migratory bird exhibition permits or hold USDA exhibition licenses. The public response we receive in response to this advance notice of proposed rulemaking will help us develop proposed regulations that provide consistency and clarity in administration of permits for migratory bird and eagle exhibition. This includes ensuring that migratory birds, including eagles, are handled and cared for in humane and healthful conditions and held in a manner consistent with the protections afforded by the MBTA and Eagle Act.

Currently, the Service requires any individual or entity to obtain a special purpose permit that authorizes possession of one or more migratory birds and an eagle exhibition permit to exhibit one or more eagles. As part of the application process, we review the experience of the caretaker, bird enclosures, and bird husbandry practices. Each caretaker (subpermittee) and enclosure are authorized on the permit. Each bird is authorized on the permit, and a transfer request must be submitted and approved to receive or transfer a bird. The Service implemented these practices to ensure the humane care and handling of migratory birds, as other Federal regulations to ensure the humane care and handling of migratory birds did not exist at that time.

On February 21, 2023, the U.S. Department of Agriculture's Animal Care Program (USDA-Animal Care) published in the *Federal Register* (88 FR 10654) a final rule pertaining to the care of birds, which includes exhibition of migratory birds. The Service is responsible for the

conservation of migratory birds. USDA-Animal Care is responsible for the humane care of animals. The Service's Migratory Birds Program and USDA-Animal Care seek to prevent conflicting regulations and minimize regulatory burden to exhibitors. The Service requests information and innovative approaches on how to best regulate the exhibition of migratory birds and exhibition of eagles, in light of the new USDA regulations. For simplicity, we use the term "exhibition" to refer to permits authorizing the public display of migratory birds or eagles. "Exhibition" includes the activities currently authorized under Migratory Bird Special Purpose Possession Live (Educational Use) permits (FWS Form 3-200-10c) as well as Eagle Exhibition permits (FWS Form 3-200-14).

### **Regulatory Approach Considered**

To balance the roles of USDA-Animal Care and the Service's Migratory Birds Program, the Service is considering the following framework. The movement of migratory birds from the wild to exhibition would be regulated by the Service. The humane care of exhibition birds would be primarily regulated under the Animal Welfare Act (AWA; 7 U.S.C. 2131 et seq.). To accomplish this, the Service would use an authorization tool called a regulatory authorization.

The Service has long authorized activities under regulatory authorizations. The origins of the regulatory authorization "general exceptions to permit requirements" (50 CFR 21.12) can be traced back as far as 1944. Regulatory authorizations are regulations that establish eligibility criteria and conditions for the take or possession of migratory birds by an entity without requiring a permit to conduct those activities. Regulatory authorizations can include conditions, recordkeeping, reporting, and inspection requirements but otherwise have a relatively low administrative burden and require little to no interaction with the Service. Regulatory authorizations are most appropriate for situations that have straightforward eligibility criteria, do not require case-by-case customization of conditions, and pose a low risk to migratory bird populations. Those who are eligible for a regulatory authorization must comply with the required

conditions, including records and reporting requirements, and are subject to enforcement for noncompliance.

## **Permitting**

The Service is considering promulgating a regulatory authorization clarifying that Service permit is not required to exhibit migratory birds for AWA license holders. This regulatory authorization could require additional conditions for migratory birds beyond an AWA license, but a permit would not be required. If an AWA license is not required, the Service would continue to authorize exhibition permits for migratory birds and eagles.

*Question 1.* What regulatory authorization conditions should the Service require in addition to AWA license conditions? Regulatory authorization conditions apply to all migratory bird exhibitors conducting activities under the regulatory authorization (i.e., all AWA licensees conducting activities with migratory birds). They are not customizable to individual situations but may be applied to a subset (e.g., all exhibitors with a particular species or all exhibitors with a certain number of birds). These could include handler or trainer requirements, humane handling or training methods, enclosure and enrichment requirements, etc. For example, the regulatory authorization could state: “migratory birds may not be handled by the general public” or “migratory birds may be held but not otherwise touched by the general public.”

*Question 2.* The Service is seeking estimates of how many exhibitors are not likely to be required to or hold an AWA license. In brief, these are exhibitors with (1) four or fewer raptors including eagles, (2) no non-raptor migratory birds, and (3) no other species that require an AWA license, such as mammals (please see <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/new-bird-rule/awa-standards-for-birds> for additional information on USDA’s New Bird Rule). For these exhibitors who do not hold an AWA license, we are also seeking input on potential changes to the permitting regulations, including whether the Service should continue using special purpose permits (under 50 CFR 21.95) for migratory birds or promulgate a new regulation for migratory bird exhibition.

Additionally, should the Service continue to have separate permits for migratory birds and eagles, or combine exhibition authorization for migratory birds and eagles into a single permit?

### **Placement of Wild Birds in Exhibition**

It is important that we maintain our role in reviewing the movement of birds from the wild to exhibition status. Under the regulatory authorization and exhibition permits, the Service would continue to regulate the movement of migratory birds to and from exhibition. Currently, this movement is primarily through rehabilitation patients being determined non-releasable and placed with exhibition entities. The Service is considering continuing the requirement that the transfer of any wild bird to exhibition must be approved by the Service prior to transfer. Rarely, but occasionally, it is appropriate for exhibition birds to be transferred to other permit types or released to the wild. The Service is considering continuing the requirement that the transfer from exhibition to another permit type or release to the wild must be approved by the Service prior to transfer. The Service is also considering not requiring Service approval of transfers between exhibitors.

*Question 3.* Should the Service continue to track transfers between exhibitors? If so, under what circumstances?

*Question 4.* The Service is considering being more restrictive in ensuring wild birds approved for exhibition are suitable for long-term captivity. Is this an appropriate role for the Service? Improved understanding of the effects of captivity on migratory birds suggests that captivity is not humane for many migratory birds, especially certain wild birds and injured birds. How should the Service design the information requested and review of transfer requests to ensure birds are suitable for exhibition use without being unduly burdensome to exhibitors or the Service?

### **Compensation and Breeding**

As part of this rulemaking, the Service is considering addressing two areas for which we frequently receive questions: compensation and breeding of exhibition birds. Service regulations

currently do not specify whether compensation is authorized for exhibition activities. The Service is considering specifically authorizing compensation for exhibition activities, as increased compensation provides more funds to adequately pay staff and humanely care for birds. We are considering defining compensation to align with AWA regulations, where compensation includes payment of program fees, merchandise sales, donations, or any other economic benefits related to exhibition of migratory birds or eagles. The Service seeks feedback on this approach.

*Question 5.* Should there be restrictions on compensation for exhibition, and if so, under what circumstances and conditions?

Currently, the breeding of exhibition birds is prohibited. The Service seeks public comment on whether breeding of exhibition birds should be authorized, and if so, under what circumstances and conditions.

*Question 6.* Should the breeding of exhibition birds be authorized, and if so, under what circumstances and conditions?

### **Exhibition and Other Permit Types**

Exhibition activities are occasionally conducted by those who hold migratory birds under other permit types, such as falconry, raptor propagation, and others. For circumstances where exhibition is not the primary use of the migratory bird, the Service is considering the following three approaches. (1) For State-licensed falconers, a regulatory authorization where no permit is required for State-licensed falconers who receive less than a set amount in compensation per calendar year for exhibition programs (e.g., \$1,000). (2) For falconry schools, if a falconry school holds an AWA license, then an MBTA exhibition permit is not required. If the falconry school does not hold an AWA license, an MBTA exhibition permit is required. (3) For other MBTA permittees who conduct exhibition activities, but exhibition is not the primary use of the migratory bird, the following would apply: If the permittee holds an AWA license for exhibition, then an MBTA exhibition permit is not required. If the permittee does not qualify for an AWA

license, exhibition authorization can be added to the existing MBTA permit (e.g., raptor propagation, waterfowl sale and disposal, etc.).

*Question 7.* Do the three approaches described above make sense for those unique use cases? Are there other unique cases we have not considered?

*Question 8.* Should the Service change practice and allow marked, individual migratory birds to be held under multiple permits? For example, a banded raptor could be authorized for falconry, raptor propagation, and exhibition.

## **Public Comments**

Please consider the following when preparing your comments:

- a. Be as succinct as possible.
- b. Be specific. Comments supported by logic, rationale, and citations are more useful than opinions.
- c. State your suggestions and recommendations clearly with an expectation of what you would like the Service to do.

To promulgate a proposed rule, we will take into consideration all comments and any additional information we receive. Please note that submissions merely stating support for or opposition to the proposed action, without providing supporting information, will be noted but not considered by the Service in making a determination. We may hold workshops or informational sessions so that interested and affected people may provide further comments and input; if we do, we will provide notice of these workshops or sessions in the *Federal Register*, or on our website (<https://www.fws.gov/program/migratory-bird-permit>), or both.

## **Public Availability of Comments**

Written comments we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that the entire comment—including your personal identifying information—may be made publicly available at any time.

While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service Headquarters (see **ADDRESSES**, above).

**Authority**

The authority for this action is the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–712) and the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d).

**Shannon A. Estenoz,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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